SERVED: June 24, 2004

NTSB Order No. EA-5101

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of June, 2004

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. DAVID JOSEPH DONNELLY, Respondent.	)	Docket SE-16222

ORDER ON PETITIONS FOR RECONSIDERATION

Both respondent and the Administrator have filed petitions for reconsideration of NTSB Order No. EA-5011, served January 2, 2003. In that decision, we dismissed cross appeals from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on July 9, 2001, following an evidentiary hearing. We dismissed both appeals because there was no majority to grant either. Accordingly, the initial decision became the order of the Board, but without precedential effect.

Both parties have filed petitions for reconsideration of that disposition. The Administrator claims that it would be error to allow the tie decision to stand because it perpetuates a clear error of law the law judge made, namely failure to impose the statutorily-required sanction of lifetime revocation. Respondent contends that the failure to reach a majority decision effectively denied him the right to appeal the law judge's

decision.[1]

Different majorities of the Board would deny both petitions. The views of the Board Members are attached.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's request for oral argument and his petition for reconsideration are denied;

2. ALPA's request to file an amicus curiae brief is granted; and

3. The Administrator's petition for reconsideration is denied.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and GOGLIA and HEALING, Members of the Board, concurred in the above order; CARMODY, Member, noted the order.

Statement of Engleman Conners, Chairman, and Rosenker, Vice Chairman

We would deny the respondent's petition for reconsideration and grant the Administrator's petition. With respect to respondent's petition, there is no statutory or regulatory requirement that the Board rule on a petition for reconsideration before judicial review is available. Before such petitions were filed here, the parties were free to seek review in a Federal Court of Appeals. The court would have had no difficulty reviewing our order, as it made clear that the law judge's decision was the decision of the Board. While this might not be the preferred result, review would have been available. We therefore reject respondent's argument that we must grant his petition to afford him due process. At the same time, however, we think it appropriate, in the context of reviewing the issue of sanction in the petition for reconsideration filed by the Administrator, to register our views with respect to the objections the respondent raised in his original appeal to the

[1] Respondent's request for oral argument is denied, as the record and the parties' briefs provide an adequate basis for decision. The request of the Air Line Pilots Association to file an amicus brief is hereby granted, since it does not appear that the submission will unduly broaden the issues. We deny the Administrator's request to respond to the amicus brief because the Administrator's position on the arguments raised in the brief is already amply developed and a matter of record from prior submissions.

Board from the law judge's finding that a sanctionable violation had been proved. The Administrator argues that we should grant her petition to correct an error of law the law judge made concerning sanction. Our rules of practice at 49 C.F.R. 821.50 clearly contemplate such grounds for reconsideration. Because we agree that the law judge erred in deciding the issue of sanction, we will, given the other conclusions he reached respecting the violation he found proved, grant this petition.

The law judge affirmed an order of the Administrator revoking respondent's airman certificates, finding that respondent had violated 49 U.S.C. 44710(b)(2). Section 44710(b)(2), REVOCATION, reads:

> (2) The Administrator shall issue an order revoking an airman certificate issued an individual under section 44703 of this title if the Administrator finds that—
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> (A) the individual knowingly carried out an activity punishable, under a law of the United States or a State related to a controlled substance (except a law related to simple possession of a controlled substance), by death or imprisonment for more than one year;
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> (B) an aircraft was used to carry out or facilitate the activity; and
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> (C) the individual served as an airman, or was on the aircraft, in connection with carrying out, or facilitating the carrying out of, the activity.

Significant to this case, whereas subparagraph (a) covers cases where a respondent was convicted under Federal or State law, subparagraph (b) covers those instances where there was no prosecution *or the individual was convicted outside the U.S.*

Respondent was a Federal Express pilot. He flew as a passenger on Northwest Airlines to Japan.[2] Japanese Customs searched him and found six tablets in a film canister. The Japanese determined that the tablets were "MDMA," otherwise known as Ecstasy. He was convicted of violating the Japanese Narcotics and Psychotropics Control Law. His sentence was suspended and he was deported to the United States.

The Administrator sought lifetime revocation based on 49 U.S.C. 44703, which provides that the Administrator may not issue an airman certificate to an individual whose certificate has been revoked under section 44710 unless the Administrator decides that

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[2] Respondent admitted that he "obtained a seat for travel on Northwest Airlines Flight 71 by virtue of his employment as a flight crew member for Federal Express" (Transcript (Tr.) at 11).

issuing the certificate will facilitate law enforcement efforts and the individual "otherwise satisfies the requirements for a certificate and subsequently is acquitted of all charges related to a controlled substance…."

The law judge affirmed the Administrator's complaint, but as noted earlier reduced the penalty from the lifetime revocation required by statute to a revocation of 18 months, after which respondent would be authorized to apply for reinstatement. Many of respondent's arguments on appeal track the various requirements of 49 U.S.C. 44710(b)(2), and we will address them in the order they are contained in the statute.

1. Was respondent convicted of an offense related to a controlled substance? Respondent argues that the Administrator failed to prove that he was carrying a controlled substance. The basis for his argument is twofold: first, there is a difference in the chemical name being used here and in Japan; and second, the Administrator did not obtain from the Japanese authorities the chemical analysis performed to support the Japanese conviction.[3] As to the first issue, the Japanese conviction documentation identifies the involved material as "N-alpha dimethyl-3,4-(methylenedioxi)[4] phenethyl amine (a.k.a. MDMA)." Exhibit A-3 at 1. Title 21, United States Code, Section 1308.11 identifies the controlled substance MDMA as "3,4 methylenedioxymethamphetamine." Exhibit A-7 at 6. A Drug Enforcement Administration chemist testified on behalf of the Administrator that these two names both identify the same chemical compound, and explained that there are different ways to name the same chemical.[5] Respondent offered no rebuttal to this testimony, and his attempt to undermine the witness' credibility through cross-examination was unconvincing. It is clear that the conviction was related to a controlled substance – MDMA. And, given the details in the Japanese documentation, we reject respondent's unsupported allegation that the Administrator did not prove a controlled substance was involved because the Japanese chemical analysis was not introduced in evidence.

2. Was the activity punishable under U.S. or State law by imprisonment for more than one year? The Administrator charged that respondent's act was punishable as a felony under Federal law at 13 U.S.C. 953, which prohibits *exportation* of controlled substances including MDMA, and introduced evidence to show that

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[3] Respondent's related claim that the Japanese judgment should not be used as evidence of anything is addressed *infra*.

[4] This last "i" should be a "y." Tr. at 131.

[5] The law judge should not have rejected this expert witness' diagrams of the chemical compound (proffered exhibit A-10).

punishment in this case could be up to 20 years in prison and would likely have ranged from 10 to 16 months in prison. Tr. at 179-182 and 13 U.S.C. 960. The Administrator offered the testimony of the Chief, Narcotics and Dangerous Goods Division, of the Criminal Division of the Department of Justice, to the effect that transporting controlled substances over international borders was *exportation*, as that term is used in the statute. Respondent offers no reason to reject this testimony, and it is compelling.[6] Further, as the punishment for exportation can be in excess of one year, this meets the terms of the statute that the activity be "punishable" by imprisonment for more than one year. Respondent, erroneously, would have us read into the statute a requirement that the punishment be for a minimum of one year.

3. Was an aircraft used to carry out or facilitate the offense? Respondent argues that the statute cannot mean that lifetime revocation was intended for airmen who are only passengers on commercial aircraft, but was intended to address cases where they acted, for example, as crew, on smuggling flights. In support of this position, he offers the legislative history of the 1982 Act that first introduced these provisions. We have consistently held differently. Administrator v. Serrato, NTSB Order No. EA-4654 (1998), and Administrator v. Hampton, NTSB Order No. EA-4251 (1994). Further, respondent offers no basis for us to decline to defer to the Administrator's interpretation. See the FAA Civil Penalty Administrative Assessment Act of 1992, P.L. No. 102-345. Finally, and most importantly, the plain language of the statute applies to the undisputed facts of this case: respondent was on the aircraft; that an aircraft was "used" to carry out the act; and that an aircraft "facilitated" the act. If Congress did not intend such a literal reading of the statute, legislative revision is in order. In the absence of ambiguity in the words of the statute, we do not look to legislative history. Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

4. May the FAA rely on the Japanese conviction? Respondent raises a broader issue here, arguing that his conviction may not

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[6] Respondent's only witness was a former Assistant U.S. Attorney who had prosecuted drug cases. Her testimony offered no basis to reject that of the Administrator's witness, as it dealt only with her experience that possession of six MDMA pills would have lead only to a misdemeanor charge. As is clear above, exportation (taking the substance across an international border) is a more serious offense than simple possession. There is also a critical difference between what might be a typical punishment and what is allowed under the statute. See discussion *infra* regarding the term "punishable."

be used here to support the section 44710 finding because the Japanese criminal justice system does not accord defendants the same rights guaranteed under our system. Respondent's evidence, however, fails to establish that he was denied any right which would have a bearing on our use of his Japanese conviction in this action. Four newspaper articles regarding one unrelated event, and describing differences between our system and theirs, cannot overcome the fact that *respondent was caught with the pills on his person* (a fact he does not deny). What happened afterwards has little or nothing to do with the issues before us.[7] We have also, like the courts,[8] previously accepted Japanese judgments in our proceedings. See Commandant v. Milly, 2 NTSB 2633 (1973), and Commandant v. Wallace, 2 NTSB 2734 (1975).

5. Is the Administrator overreaching? Respondent argues that Congress could not possibly have intended such a harsh penalty for what he views as a minor infraction. Nevertheless, and consistent with the prior discussion, we have no basis on which to conclude that the Administrator is without authority to interpret the statute as she has and to proceed as she has.

Turning to the Administrator's petition, we agree that the law judge had no authority to reduce the sanction to a revocation of eighteen month's duration. While his sympathies were clearly with respondent, his conclusion was inappropriate and unavailable. The statute at § 44703 prescribes lifetime revocation unless certain specific conditions not present here have been met. The law judge, having found a violation to which that provision applied, had no authority to impose anything less. Accordingly, we would reverse that part of the initial decision and impose the sanction sought by the Administrator and required by law.[9]

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[7] Moreover, counsel's discussion of how respondent was treated in Japan after he was arrested and his statement that the pills were for respondent's girlfriend are just that — counsel's statements. They are not evidence. Neither respondent nor anyone else testified about what actually happened. Neither we nor the law judge may use counsel's statements as facts proven on the record, and the law judge should not have taken them into consideration as if they were established facts.

[8] See Lloyd v. American Export Lines, et al., 580 F.2d 1179, at 1189 (C.A. 3, 1978) (Japanese proceedings found to accord with American principles of "civilized jurisprudence").

[9] The Administrator also asks that we admit into the record certain evidence the law judge excluded, i.e., medical reports prepared by a psychologist and a psychiatrist in connection with

(continued…)

Statement of Carmody, Member

I would deny the Administrator's appeal becaue I do not agree with her statutory interpretation. I have read the Congressional language explaining the intent of the legislation, and I do not believe it extends to the circumstances described in this case. The Administrator's interpretation here of the "use" of the aircraft ignores the explicit legislative history directed toward private aircraft drug smuggling operations where airmen are exercising their certificates in committing the offense. (Senate Report No. 98-228). The House Senate Conference Report No. 98-1085 defines the phrase "facilitate the commission of the offense" to mean "situations where the aircraft is not actually used to carry the drugs but is still involved with the illegal transaction in some other way, such as by acting as a spotter plane, or by use of the aircraft to transport participants in an illegal drug transaction to a meeting." Congress did not intend that "use of an aircraft" would include sitting as a passenger on a commercial airliner. Although case law tells us that we do not look behind a statute that is clear on its face, that is not the same as adopting an interpretation inconsistent with the intent of Congress. The FAA must not be allowed to over-interpret legislation in the effort to punish illegal drug carriage.

In previous cases where the NTSB has upheld revocation when the party was a passenger on an aircraft (Administrator v. Serrato and Administrator v. Hampton), the circumstances and the actions were considerably more serious and vastly different than in this case. Both Serrato and Hampton involved airmen already convicted under U.S. law, and involved multiple trips to the Bahamas to purchase cocaine and bring it back to the U.S. for sale; and multiple convictions for conspiracy to possess and distribute cocaine.

I would grant the respondent's request for reconsideration.

Statement of Healing, Member, in which Goglia, Member, Joined

I approve that, while accepting the amicus curiae brief from ALPA, we deny the petitions of both Donnelly and the FAA.

The FAA's petition was filed unnecessarily. By achieving revocation under § 44710, the FAA had already won "lifetime

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(continued…)
respondent's application for a medical certificate. We agree with the Administrator that it was error for the law judge to exclude this evidence. Respondent's argument that California State doctor-patient confidentiality provisions preclude use of these medical reports is without merit. State law is not controlling in our proceedings.

revocation" against Donnelly; because § 44703 requires the FAA to never issue an airman certificate to anyone who has had his certificate revoked under § 44710. Even though the ALJ ordered an 18-month revocation, he found that Donnelly was subject to § 44710; and attaching a time period to the revocation is meaningless and harmless to the FAA's intent. The FAA achieved the lifetime revocation, making their petition of the order moot.